

AMENDED IN SENATE JUNE 16, 2003

AMENDED IN ASSEMBLY MAY 7, 2003

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 1218

Introduced by Assembly Member Dutra

February 21, 2003

An act to amend Section 25299.57 of, and to add Article 6.5 (commencing with Section 25299.64) to Chapter 6.75 of Division 20 of, the Health and Safety Code, relating to underground storage tanks.

LEGISLATIVE COUNSEL'S DIGEST

AB 1218, as amended, Dutra. Underground storage tanks: claims: performance based contracts.

Under the existing Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989, owners and operators of petroleum underground storage tanks requires every owner of an underground storage tank to pay a storage fee for each gallon of petroleum placed in the tank. The fees are required to be deposited in the Underground Storage Tank Cleanup Fund. The money in the fund may be expended by the State Water Resources Control Board, upon appropriation by the Legislature, for various purposes, including the payment of claims to aid owners and operators of petroleum underground storage tanks who take corrective action to clean up unauthorized releases from those tanks.

This bill would authorize the board to pay a claim to reimburse the cost of a performance based contract, ~~as defined, for corrective action~~ that is approved by the board *as being consistent with the requirements*

of the bill. The bill would require a performance based contract to include specified terms and would require the board to make payments under a performance based contract based upon the ~~actual~~ reduction of ~~contamination of the site~~ *designated constituents of concern to specified concentrations.*

The bill would require the board to ~~monitor~~ *advertise* the bidding for a performance based contract and would require the board to be the receiving address for ~~sealed performance based contract~~ bids. ~~The board would be required to adopt regulations to implement the bill.~~

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 25299.57 of the Health and Safety Code
2 is amended to read:
3 25299.57. (a) If the board makes the determination specified
4 in subdivision (d), the board may only pay for the costs of a
5 corrective action that exceeds the level of financial responsibility
6 required to be obtained pursuant to Section 25299.32, but not more
7 than one million five hundred thousand dollars (\$1,500,000) for
8 each occurrence. In the case of an owner or operator who, as of
9 January 1, 1988, was required to perform corrective action, who
10 initiated that corrective action in accordance with Division 7
11 (commencing with Section 13000) of the Water Code or Chapter
12 6.7 (commencing with Section 25280), and who is undertaking the
13 corrective action in compliance with waste discharge
14 requirements or other orders issued pursuant to Division 7
15 (commencing with Section 13000) of the Water Code or Chapter
16 6.7 (commencing with Section 25280), the owner or operator may
17 apply to the board for satisfaction of a claim filed pursuant to this
18 article. The board shall notify claimants applying for satisfaction
19 of claims from the fund of eligibility for reimbursement in a
20 prompt and timely manner and that a letter of credit or
21 commitment that will obligate funds for reimbursement shall
22 follow the notice of eligibility as soon thereafter as possible.
23 (b) (1) For claims eligible for reimbursement pursuant to
24 subdivision (c) of Section 25299.55, the claimant shall submit the
25 actual cost of corrective action to the board, which shall either
26 approve or disapprove the costs incurred as reasonable and

1 necessary. At least 15 days before the board proposes to
2 disapprove the reimbursement of corrective action costs that have
3 been incurred on the grounds that the costs were unreasonable or
4 unnecessary, the board shall issue a notice advising the claimant
5 and the lead agency of the proposed disallowance, to allow review
6 and comment.

7 (2) The board shall not reject any actual costs of corrective
8 action in a claim solely on the basis that the invoices submitted fail
9 to sufficiently detail the actual costs incurred, if all of the
10 following apply:

11 (A) Auxiliary documentation is provided that documents to the
12 board's satisfaction that the invoice is for necessary corrective
13 action work.

14 (B) The costs of corrective action work in the claim are
15 reasonably commensurate with similar corrective action work
16 performed during the same time period covered by the invoice for
17 which reimbursement is sought.

18 (C) The invoices include a brief description of the work
19 performed, the date that the work was performed, the vendor, and
20 the amount.

21 (c) (1) For claims eligible for prepayment pursuant to
22 subdivision (c) of Section 25299.55, the claimant shall submit the
23 estimated cost of the corrective action to the board, which shall
24 approve or disapprove the reasonableness of the cost estimate.

25 ~~(2) If the claim is for a performance-based contract, the board~~
26 ~~shall comply with Article 6.5 (commencing with Section~~
27 ~~25299.64) and shall pay the claim in accordance with that article.~~

28 *(2) If the claim is for reimbursement of costs incurred pursuant*
29 *to a performance-based contract, Article 6.5 (commencing with*
30 *Section 25299.64) shall apply to that claim.*

31 (d) Except as provided in subdivision (j), a claim specified in
32 subdivision (a) may be paid if the board makes all of the following
33 findings:

34 (1) There has been an unauthorized release of petroleum into
35 the environment from an underground storage tank.

36 (2) The claimant is required to undertake or contract for
37 corrective action pursuant to Section 25296.10, or, as of January
38 1, 1988, the claimant has initiated corrective action in accordance
39 with Division 7 (commencing with Section 13000) of the Water
40 Code.

(3) (A) Except as provided in subparagraph (B), the claimant has complied with Section 25299.31 and the permit requirements of Chapter 6.7 (commencing with Section 25280).

(B) All claimants who file their claim on or after January 1, 1994, and all claimants who filed their claim prior to that date but are not eligible for a waiver of the permit requirement pursuant to board regulations in effect on the date of the filing of the claim, and who did not obtain or apply for any permit required by subdivision (a) of Section 25284 by January 1, 1990, shall be subject to subparagraph (A) regardless of the reason or reasons that the permit was not obtained or applied for. However, on and after January 1, 1994, the board may waive the provisions of subparagraph (A) as a condition for payment from the fund if the board finds all of the following:

(i) The claimant was unaware of the permit requirement prior to January 1, 1990, and there was no intent to intentionally avoid the permit requirement or the fees associated with the permit.

(ii) Prior to submittal of the application to the fund, the claimant has complied with Section 25299.31 and has obtained and paid for all permits currently required by this paragraph.

(iii) Prior to submittal of the application to the fund, the claimant has paid all fees, interest, and penalties imposed pursuant to Article 5 (commencing with Section 25299.40) and Part 26 (commencing with Section 50101) of Division 2 of the Revenue and Taxation Code for the underground storage tank that is the subject of the claim.

(C) (i) A claimant exempted pursuant to subparagraph (B) shall obtain a level of financial responsibility twice as great as the amount which the claimant is otherwise required to obtain pursuant to subdivision (a) of Section 25299.32.

(ii) The board may waive the requirements of clause (i) if the claimant can demonstrate that the conditions specified in clauses (i) to (iii), inclusive, of subparagraph (B) were satisfied prior to the causing of any contamination. That demonstration may be made through a certification issued by the permitting agency based on site and tank tests at the time of permit application or in any other manner acceptable to the board.

(D) The board shall rank all claims resubmitted pursuant to subparagraph (B) lower than all claims filed before January 1,

1 1994, within their respective priority classes specified in
2 subdivision (b) of Section 25299.52.

3 (4) The board has approved either the costs incurred for the
4 corrective action pursuant to subdivision (b) or the estimated costs
5 for corrective action pursuant to subdivision (c).

6 (5) The claimant has paid all fees, interest, and penalties
7 imposed pursuant to Article 5 (commencing with Section
8 29299.40) and Part 26 (commencing with Section 50101) of
9 Division 2 of the Revenue and Taxation Code for the underground
10 storage tank that is the subject of the claim.

11 (e) The board shall provide the claimant, whose cost estimate
12 has been approved, a letter of credit authorizing payment of the
13 costs from the fund.

14 (f) The claimant may submit a request for partial payment to
15 cover the costs of corrective action performed in stages, as
16 approved by the board.

17 (g) (1) Any claimant who submits a claim for payment to the
18 board shall submit multiple bids for prospective costs as
19 prescribed in regulations adopted by the board pursuant to Section
20 25299.77.

21 (2) Any claimant who submits a claim to the board for the
22 payment of professional engineering and geologic work shall
23 submit multiple proposals and fee estimates, as required by the
24 regulations adopted by the board pursuant to Section 25299.77.
25 The claimant's selection of the provider of these services is not
26 required to be based on the lowest estimated fee, if the fee estimate
27 conforms with the range of acceptable costs established by the
28 board.

29 (3) Any claimant who submits a claim for payment to the board
30 for remediation construction contracting work shall submit
31 multiple bids, as required in the regulations adopted by the board
32 pursuant to Section 25299.77.

33 (4) Paragraphs (1), (2), and (3) do not apply to a tank owned or
34 operated by a public agency if the prospective costs are for private
35 professional services within the meaning of Chapter 10
36 (commencing with Section 4525) of Division 5 of Title 1 of the
37 Government Code and those services are procured in accordance
38 with the requirements of that chapter.

39 (h) The board shall provide, upon the request of a claimant,
40 assistance to the claimant in the selection of contractors retained

1 by the claimant to conduct reimbursable work related to corrective
2 actions. The board shall develop a summary of expected costs for
3 common remedial actions. This summary of expected costs may
4 be used by claimants as a guide in the selection and supervision of
5 consultants and contractors.

6 (i) The board shall pay, within 60 days from the date of receipt
7 of an invoice of expenditures, all costs specified in the work plan
8 developed pursuant to Section 25296.10, and all costs that are
9 otherwise necessary to comply with an order issued by a local,
10 state, or federal agency.

11 (j) (1) The board shall pay a claim of not more than three
12 thousand dollars (\$3,000) per occurrence for regulatory technical
13 assistance to an owner or operator who is otherwise eligible for
14 reimbursement under this chapter.

15 (2) For the purposes of this subdivision, regulatory technical
16 assistance is limited to assistance from a person, other than the
17 claimant, in the preparation and submission of a claim to the fund.
18 Regulatory technical assistance does not include assistance in
19 connection with proceedings under Section 25296.40,
20 25299.39.2, or 25299.56 or any action in court.

21 (k) (1) Notwithstanding any other provision of this section, the
22 board shall pay a claim for the costs of corrective action to a person
23 who owns property on which is located a release from a petroleum
24 underground storage tank that has been the subject of a completed
25 corrective action and for which additional corrective action is
26 required because of additionally discovered contamination from
27 the previous release, only if the person who carried out the earlier
28 and completed corrective action was eligible for, and applied for,
29 reimbursement pursuant to subdivision (b), and only to the extent
30 that the amount of reimbursement for the earlier corrective action
31 did not exceed the amount of reimbursement authorized by
32 subdivision (a). Reimbursement to a claimant on a reopened site
33 shall occur when funds are available, and reimbursement
34 commitment shall be made ahead of any new letters of
35 commitment to be issued, as of the date of the reopening of the
36 claim, if funding has occurred on the original claim, in which case
37 funding shall occur at the time it would have occurred under the
38 original claim.

39 (2) For purposes of this subdivision, a corrective action is
40 completed when the local agency or regional board with

jurisdiction over the site or the board issues a closure letter pursuant to subdivision (g) of Section 25296.10.

SEC. 2. Article 6.5 (commencing with Section 25299.64) is added to Chapter 6.75 of Division 20 of the Health and Safety Code, to read:

Article 6.5. Performance Based Contract

~~25299.64. (a) For purposes of this article, the following definitions shall apply:~~

~~(1) "Performance based contract" means a fixed price contract to take a corrective action where payment is made when preestablished cleanup milestones are reached. A performance based contract shall include set milestones, goals, a schedule for completion, and a payment schedule for meeting milestones, goals, and timeframes.~~

~~(2) "Contaminant level" means the contaminant level of a release that exists before a corrective action is implemented pursuant to a performance based contract.~~

~~(b) The board may pay a claim pursuant to Section 25299.57 to reimburse the cost of a performance based contract for corrective action that is approved by the board pursuant to this section. A claimant and an appropriately licensed contractor guaranteeing the corrective action shall be the parties to the performance based contract. A claimant shall obtain the approval of the board for all costs before initiating work under a performance based contract.~~

~~(c) The terms of a performance based contract shall include, but not be limited to, the total amount to be paid for completion of the corrective action provided for by the contract, corrective action goals, and the negotiated schedule for completion of goals or milestones.~~

~~(d) The board shall make payments under a performance based contract based upon the actual reduction of contamination of the site that is subject to the corrective action. For those sites for which the board estimates that corrective action will take more than six months and will require the installation and operation of a mechanical remediation system, the board may make the payments under a performance based contract using a phased payment system, in the following manner:~~

~~(1) The first payment shall include the amount of incurred capital costs upon successful installation and startup of the mechanical remediation system.~~

~~(2) The second payment shall be an amount equal to the agreed upon percent of the total contract price for the first 25 percent reduction in the contaminant level.~~

~~(3) The third payment shall be equal to an agreed upon percent of the total contract price for the next 25 percent reduction in the contaminant level, if there is a total of 50 percent reduction in the contaminant level.~~

~~(4) The fourth payment shall be equal to an agreed upon percent of the total contract price for the next 25 percent reduction in the contaminant level, if there is a total of 75 percent reduction in the contaminant level.~~

~~(5) The fifth payment shall be equal to an agreed upon percent of the total contract price for the next 25 percent reduction in the contaminant level, if there is a total of 100 percent reduction in the contaminant level.~~

~~(6) The final payment shall be the amount of the remaining contract price to be paid one year after the completion of the corrective action, if the site is in compliance with the preliminary active remediation goal established in the contract.~~

~~25299.65. (a) An owner or operator shall submit multiple bids for a performance based contract in accordance with paragraph (1) of subdivision (g) of Section 25299.57 and any regulations adopted by the board to implement that section.~~

~~(b) To assist claimants in soliciting the minimum bids and receiving adequate bids, the board shall monitor the bidding for a performance based contract, and all performance based contracts shall be advertised through the board's Web site. The board shall be the receiving address for sealed performance based contract bids. This subdivision does not prevent the board from approving a performance based contract covering multisite cleanups, if the board determines that economies of scale will assist in soliciting bids or reducing overall costs.~~

~~(c) In approving a site for corrective action under a performance based contract, the board shall consider the following site conditions as the best candidates for a performance based contract:~~

1 ~~(1) A site that has been open, in that the site has been reported~~
2 ~~as an unauthorized release to the board, the regional board, or local~~
3 ~~agency for five or more years, and either corrective action has not~~
4 ~~begun or initiated corrective action has failed to significantly~~
5 ~~reduce constituents of concern.~~

6 ~~(2) A site that has been the subject of an approved active~~
7 ~~corrective action for two or more years and contamination levels~~
8 ~~have failed to decline significantly, or are reaching asymptotic~~
9 ~~levels and closure is not imminent within two years.~~

10 ~~(3) A site where corrective action is nearing the maximum fund~~
11 ~~reimbursement amount, or continued corrective action is expected~~
12 ~~to exceed maximum reimbursements prior to case closure.~~

13 ~~(4) A new site that has the potential to impact nearby receptors~~
14 ~~or otherwise cause significant impact to the waters of the state.~~

15 ~~(5) A site that has released MTBE, as defined in Section~~
16 ~~25299.97, into groundwater and has not initiated corrective action~~
17 ~~within a reasonable timeframe after site assessment, or any high~~
18 ~~priority MTBE site that has not initiated satisfactory corrective~~
19 ~~action as determined by the board or local agency, or according to~~
20 ~~any regulations adopted pursuant to Section 25296.30.~~

21 ~~(6) A monitoring-only site where corrective action under a~~
22 ~~performance based contract can be completed sooner and at a~~
23 ~~lower cost than continued monitoring.~~

24 ~~(d) This article does not prohibit a claimant from voluntarily~~
25 ~~entering into a performance based contract.~~

26 ~~25299.66. The board shall adopt regulations to implement~~
27 ~~this article pursuant to Section 25299.77.~~

28 ~~25299.64. (a) For purposes of this article, the following~~
29 ~~definitions shall apply:~~

30 ~~(1) "Baseline concentration" means the initial concentration~~
31 ~~of a constituent of concern prior to conducting corrective action~~
32 ~~pursuant to a performance-based contract.~~

33 ~~(2) "Constituent of concern" means the chemical element,~~
34 ~~compound, or grouping, including, but not limited to, total~~
35 ~~petroleum hydrocarbons, as in gasoline, that is present in the soil~~
36 ~~or groundwater and subject to corrective action.~~

37 ~~(3) "Performance-based contract" means a written agreement~~
38 ~~approved by the board between a claimant and an appropriately~~
39 ~~licensed contractor, where the contractor agrees for a fixed price~~

1 to take a corrective action to reduce the concentrations of
2 designated constituents of concern to specified concentrations.

3 (4) “Remediation milestone” means that a specified reduction
4 in the concentrations of constituents of concern from baseline
5 concentrations has been attained through corrective action. The
6 reduction is expressed as a percentage of the total reduction
7 required by the performance-based contract.

8 (b) The board may pay a claim pursuant to Section 25299.57
9 to reimburse the cost of a performance-based contract if the board
10 approves the contract as being consistent with this article.

11 (c) A performance-based contract includes, but is not limited
12 to, all of the following elements:

13 (1) The total fixed price contract.

14 (2) The amount.

15 (3) Designated constituents of concern.

16 (4) Baseline concentrations.

17 (5) If appropriate, a payment schedule indicating the amount
18 to be paid when specified remediation milestones are attained.

19 (d) The board shall make payments based upon the reduction
20 in the concentrations of designated constituents of concern to
21 specified concentrations. If corrective action is estimated to take
22 six months or more to achieve these concentrations and the
23 remediation technology proposed is a pump-and-treat or other
24 type of mechanical remediation technology, the board may pay a
25 portion of the fixed price based on the attainment of specified
26 remediation milestones or other performance parameters, in the
27 following manner:

28 (1) The first payment shall include the amount of incurred
29 capital costs upon successful installation and startup of the
30 mechanical remediation system.

31 (2) The second payment shall be an amount equal to the agreed
32 upon percent of the total contract price when the 25 percent
33 remediation milestone is attained.

34 (3) The third payment shall be equal to an agreed upon percent
35 of the total contract price when the 50 percent remediation
36 milestone is attained.

37 (4) The fourth payment shall be equal to an agreed upon
38 percent of the total contract price when the 75 percent remediation
39 milestone is attained.

1 (5) *The fifth payment shall be equal to an agreed upon percent*
2 *of the total contract price when the 100 percent remediation*
3 *milestone is attained.*

4 (6) *The final payment shall be the amount of the remaining*
5 *contract price that shall to be paid when the 100 percent*
6 *remediation milestone has been maintained for one year following*
7 *cessation of all active remediation goal.*

8 25299.65. (a) *The claimant shall submit multiple bids for a*
9 *performance-based contract in accordance with paragraph (1) of*
10 *subdivision (1) of Section 25299.57 and any regulations adopted*
11 *by the board to implement that section.*

12 (b) *To assist claimants in soliciting bids for a*
13 *performance-based contract projects, the board shall advertise*
14 *bid solicitations for these projects through the board's Web site.*
15 *The board shall be the receiving address for the bids, and shall*
16 *offer other assistance, upon request, in accordance with the*
17 *regulations adopted pursuant to this chapter. The bids shall be*
18 *sealed prior to submittal to the board. This subdivision does not*
19 *prevent the board from approving a performance-based contract*
20 *covering multisite cleanups, if the board determines that*
21 *economies of scale will assist claimants in soliciting bids or*
22 *reducing overall costs.*

23 (c) *The sites for which, the board may consider approving a*
24 *performance-based contract include, but are not limited to, all of*
25 *the following:*

26 (1) *A site that had an unauthorized release reported to the*
27 *board, the regional board, or local agency five or more years ago*
28 *and active remediation has not begun.*

29 (2) *A site where corrective action has been implemented for two*
30 *or more years pursuant to a corrective action plan that was*
31 *approved by the board, the regional board, or local agency, but*
32 *that corrective action has not been effective in reducing the*
33 *concentrations of the constituents of concern to the satisfaction of*
34 *that board or agency.*

35 (3) *A site where corrective action costs are expected to exceed*
36 *the maximum fund reimbursement amount prior to case closure.*

37 (4) *A site where the board, the regional board, or local agency*
38 *has recently determined that an unauthorized release has occurred*
39 *that has the potential to impact nearby receptors or otherwise*
40 *cause significant impact to the waters of the state.*

1 (5) A site where an unauthorized release of MTBE, as defined
2 in paragraphs (2) of subdivision (a) of Section 25299.97, has
3 occurred and corrective action has not been initiated or
4 satisfactorily conducted, as determined by the board, the regional
5 board, or local agency, or according to any regulations adopted
6 pursuant to Section 25296.30.

7 (6) A site where the board, the regional board, or local agency
8 has determined that corrective action other than ongoing
9 monitoring of ground-water is more likely to reduce the
10 concentrations of constituents of concern sooner and at a lower
11 cost.

12 (d) This article does not preclude a claimant from requesting
13 the board consider approving a performance-based contract to
14 conduct corrective action at the claimant's site.

15 25299.66. This article does not limit or abridge the powers
16 and duties granted to the board, the regional board, or local
17 agency pursuant to any other provision of law.

